DRAFT

22 July 1980

MEMORANDUM FOR: Director of Central Intelligence

THROUGH : Deputy Director of Central Intelligence

STAT FROM : [redacted]
SA to the DCI for Compartmentation

SUBJECT : APEX - Nondisclosure Agreement (NdA)

REFERENCE : Para 5 of your 17 JUly 1980 MFR Concerning 16 July Conversation with Secretary of State

1. Mr. Silver, et al, will respond to the specific questions and action in your memorandum. Paragraph 4. contains options. Paragraph 5 makes a recommendation.

2. When I received your note on your 16 July conversation with the Secretary of State, I thought perhaps that we had awakened some sleeping dogs. The State objection to the Nondisclosure Agreement (NdA) might actually be an objection to the prohibitions in the old Form 4066. That is, I thought perhaps that State was objecting to the existing obligation to protect SCI forever, or, as paragraph 10 of 4066 states, "at all times thereafter." In order to test this thesis, I talked to several people in State about whether or not the Secretary would go along with continued use of the old form. The answers (of uncertain correctness) were that he would agree to continue use of Form 4066. Subsequent conversation suggests

85-0150/20

very strongly that the State objections are more emotional than logical and are based significantly, in part, on the fact that State neither has nor wishes to create a mechanism to review manuscripts prior to their being presented to the the public. Further, State objects to the concept that prepublication review could ever be required by any senior State official. In my view, the problem with the NdA is not that it can be interpreted as requiring a rather broad group of things be submitted for review, but that anything must be submitted for review.

3. OGC's effort in composing the NdA had several objectives. In addition to protecting SCI, the language also was aimed at protecting the individual who must sign the NdA in the light of the Snepp case. The NdA unlike the existing Form 4066, provides a way for an individual who had had access to SCI to write or speak without being subject to jeopardy from US-instituted action like that used against Snepp. The device providing that protection is contained in the paragraphs to which State objects. Those paragraphs allow the person who wishes to write to transfer to the Government the responsibility for determining if his or her material impinges on SCI. The Government obligates itself to act quickly to either bless or suggest modifications in the writing. By this assumption of

work and responsibility, the Government, again, takes away what is now Snepp-like jeopardy for anyone who writes or speaks about his or her work or career and who had access to SCI. Again, as I understand it, State does not feel the need to provide that protection to the individual who wishes to write and even more strongly objects to providing the mechanism that would provide that protection. I do not hold the State view to be a logical one. The existing Form 4066 says: "Unless I am released in writing by an authorized representative of the United States Government. . .", I won't publish. I do not understand how State can believe that one can get a "release in writing" without a prepublication review, but State, nevertheless, feels that Form 4066 does not require a prepublication review and will, again, continue to accept it.

4. All of the above notwithstanding, we need to proceed if APEX is ever to get off the ground. I still see the same options that were discussed with you and the DDCI two weeks ago:

a. Promulgate the existing Nondisclosure Agreement, which I think would be accepted by the rest of NFIB and the contractor world. This would leave State with three options:

(1) Fall in line:

(2) Appeal to NSC per PD/NSC-55;

(3) Refuse to sign. You would then presumably cut-off State access to SCI and we would wind up as if they had appealed--in the White House;

b. Explain the problem to the President or the White House staff and ask for guidance;

c. Reissue Form 4066 with minor modification in paragraph 1 to make explicit the existence of APEX and to remove specific access listings from the form. This option would not be well regarded by OGC because:

(1) the document may not be "legally sufficient;

(2) the signer of the new 4066 would not receive adequate guidance on how to protect him or herself from Snepp-like jeopardy;

(3) The document is not well written in OGC's view.

d. Exempt State, in whole or in part, from the APEX requirement. I vehemently oppose such a decision.

5. Again, the proposed NdA does not, in my view increase the obligations imposed on the signer of the existing 4066, but it does make his or her obligation more clear and it does provide direction for his or her safety not contained in Form 4066. The clarity and protection points have been effectively sold to the APEX Steering Group and to many of the Community's lawyers by OGC people, especially [redacted] and would need be unsold if Option c. is selected. Option d., to me, is unthinkable. I see little realistic difference between Option a. and Option b. Option a. permits State to back off. State, under Option a., has to create the confrontation at the White House level. Under Option b., you would create that confrontation. PD/NSC-55 is quite explicit: "Uniform security standards established by the Director of Central Intelligence will govern access to, distribution of, and protection of intelligence

STAT

sources and methods. . ." The APEX security policy manuals that you have approved specify signing of a single Community-wide NdA as a major part of your standards. I have hope, albeit small, that OGC will be able to bring State along with the Nondisclosure Agreement. If, however, OGC is unable to persuade State, I recommend that you direct me to promulgate the NdA (Option a.).

STA